IN THE

Supreme Court of the United States

October Term, 1978

No. 78-369

MAURICE SHANNON, *et al.*,
Petitioners

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT W. ~~SAYER~~ SAYRE
3800 Centre Square West
Philadelphia, Pennsylvania 19102
(215) 972-7709

MICHAEL CHURCHILL
THOMAS K. GILHOOL
Public Interest Law Center of Philadelphia
1315 Walnut Street, Suite 1600
Philadelphia, Pennsylvania 19107
(215) 735-7200
Attorneys for Petitioners

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

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TO THE UNITED STATES COURT OF APPEALS
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Petitioners, plaintiffs below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*) is reported at 577 F.2d 854. The opinion and order of the District Court for the Eastern District of Pennsylvania (Appendix B, *infra*) are reported at 433 F.Supp. 249.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) to review the order of the Court of Appeals entered on June 5, 1978.

QUESTION PRESENTED

Whether the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641 (42 U.S.C.A. §1988) authorizes fees to be awarded to a plaintiff prevailing against the United States in a suit under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*

STATUTES INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. §1988 (Supp. 1974-1977) provides as follows:

> "§1988. **Proceedings in vindication of civil rights** . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. As amended Pub. L. 94-559, §2, Oct. 19, 1976, 90 Stat. 2641."

28 U.S.C. §2412 (1976) provides as follows:

> "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action .... (June 25, 1948, ch. 646, 62 Stat. 973; July 18, 1966, Pub. L. 89-507, §1, 80 Stat. 308.)"

STATEMENT OF THE CASE

This is a petition for certiorari from the denial of an attorney's fee to the prevailing plaintiffs in an action brought, *inter alia*, under Title VI of the 1964 Civil Rights Act against the Department of Housing and Urban Development and several of its officials.

Plaintiffs' action to enjoin approval by the Department of financing for a subsidized housing project known as Fairmount Manor in Philadelphia was originally dismissed by the District Court in an opinion reported at 305 F.Supp. 205 (E.D. Pa. 1969). In the absence of a stay, construction of the project was completed pending the appeal. The Circuit Court of Appeals reversed, holding that the Department had violated certain civil rights laws, including Title VI and the Fair Housing Act (Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 *et seq.*), by failing to consider racial impact in approving the location of subsidized housing, 436 F.2d 809 (3rd Cir. 1970), and remanded for further proceedings.

Extended negotiations and hearings ensued. The District Court, at the urging of Plaintiffs, ordered the Department to retain experts to prepare an analysis of the impact of the illegally approved project and a remedial program. Defendants contested the right of the Plaintiffs to any remedy and a hearing on the scope of relief was held prior to a settlement being agreed upon and the entry of a judgment for Plaintiffs in May 1975.

As a consequence of Plaintiffs' action the Department promulgated Site Selection Criteria regulations, found at 24 CFR 200.700 *et seq.*; contributed $500,000 to subsidize construction and sale of 42 new units of homeownership housing in the affected community and approved mortgage insurance for such houses; contributed $150,000 for physical improvements to Fairmount Manor; and approved subsidized financing and mortgage insurance for 150 additional units of senior citizen housing in the affected community.

Plaintiffs, pursuant to the settlement, moved for an award of attorney's fees under Title VIII of the Civil Rights Act of 1968, which was denied on March 1, 1976 on the grounds that the attorney's fee provision of 42 U.S.C. §3612 did not apply to Section 3608(d) on which, *inter alia*, relief had been predicated. 409 F.Supp. 1189. No appeal was taken.

Plaintiffs' bill of costs, filed on November 13, 1975, was still pending before the District Court on appeal from the Clerk's ruling at the time of the enactment of the Civil Rights Attorney's Fees Awards Act of 1976 on October 19, 1976. Plaintiffs thereafter timely renewed their petition for attorney's fees on the ground that fees were permitted as part of the costs under the Act, that it governed pending matters, and that as parties prevailing under Title VI Plaintiffs met all the criteria of the Act.

In an opinion dated June 16, 1977 (Appendix B, *infra*) the District Court held the issue was properly before it, but denied any award solely on the ground that 28 U.S.C. §2412 "stands as an explicit assertion of sovereign immunity" barring awards of fees against the United States in the absence of "unequivocal" statutory authorization and that the Fees Awards Act did not constitute such statutory authorization. It entered an order denying fees and awarding other costs.

The Circuit Court, in an opinion filed June 5, 1978 (Appendix A, *infra*), affirmed the District Court's denial of attorney's fees, holding that the Fees Awards Act did not contain "clear statutory authority" for waiver of sovereign immunity and imposition of attorney's fees against the United States in connection with the civil rights actions included in the Act.

REASONS FOR GRANTING THE WRIT

This Court should review and reverse the Court of Appeals decision in this case because it decides an important question of federal law with wide applicability in a manner inconsistent with a recent interpretation of the same statute by this Court in *Hutto v. Finney*, ___ U.S. ___, 98 S.Ct. 2565 (June 23, 1978), and contrary to the legislative history of the Fees Awards Act and to the intended effect of the same language employed by Congress in another recent statute authorizing attorney's fees to be awarded against the United States. The decision is also in conflict with administrative interpretations of the Fees Awards Act adopted by the Department of Justice both before and after enactment.

The decision of the Court of Appeals sought to be reviewed has been rejected by the District Court for the District of Columbia (Gesell, *J.*) which ordered the United States to pay $19,874.03 in attorney's fees and out-of-pocket expenses under the Fees Awards Act after the Government submitted the same brief as it filed with the Third Circuit in this case and had drawn the Third Circuit's opinion to the attention of the District Court. *Andrulis, et al. v. United States of America, et al.*, Civil Action 77-1936 (Mem. Opinion of June 12, 1978, clarified, July 13, 1978).

The opinion of the Court of Appeals is inconsistent with this Court's subsequent interpretation of the Fees Awards Act in *Hutto v. Finney, supra*, at 2575:

> "The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions; ..."

Similarly, there is no "hint of any exception" for the federal government. Indeed, one clause of the Act, referring to awards to any party (except the United States) prevailing in enforcement proceedings under the Internal Revenue Code can *only* apply to awards against the United States.

In *Hutto v. Finney* the Court held that such "plain indication of legislative intent" (bolstered by "equally plain" legislative history) was sufficient to set aside

sovereign immunity of the States, and rejected a claim that "Congress must enact express statutory language." *Id.* at 2576.

By contrast, in this case, the Third Circuit adopted the District Court's view that the 1976 Act was not sufficiently clear statutory authority because it did not contain the same express language found in Titles II, III and VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000a-3(b), 2000b-1, 2000e-5(k).[1]

Not only does this view conflict with the principle expressed in *Hutto v. Finney*, but Congress in the legislative history of the 1977 Clean Air Act Amendments, Aug. 7, 1977, P.L. 95-95, Sec. 305(f), 91 Stat. 777, explicitly stated that the general authorization of attorney's fees contained in the amendment enacted to Section 307(f), 42 U.S.C.A. §7607 (Supp. 1977),[2] which does not contain any express reference to the United States was intended to waive sovereign immunity and constitute authorization under 28 U.S.C. Section 2412:

> "In adopting this provision concerning fees, the committee intended to meet the requirement for specific authorization imposed by 28 U.S.C. sec. 2412 and by the Supreme Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975)." H.R. Rep. No. 95-294, at p.337; 8 U.S. Code Congressional and Administrative News, 1977, p.2546.

1. Title II provides, for example:

"In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person." 42 U.S.C. Section 2000a-3(b).

2. 42 U.S.C.A. §7607(f) provides:

"In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate."

This language is identical to the attorney's fee provision included in the citizen suit provisions of the 1970 Clean Air Act, 42 U.S.C.A. §7604 and is similar to the broad lanugage of the Civil Rights Attorney's Fees Awards Act.

The very same portion of legislative history of the Fees Awards Act in the House Report which is cited in *Hutto v. Finney, supra*, at 2575-6 to show sufficient legislative intention to award fees against state governments explicitly refers in the same paragraph to a suit against federal officials, *Hills v. Gautreaux* as one of three examples of cases to which the Act would apply.[3] Reference is also made to that case, *sub nom*, *Hills v. Gautreaux*, ___ U.S. ___, 96 S.Ct. 1538 (April 20, 1976) and to another case against federal officials, *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) in the House Report at page 5 when identifying the scope of the civil rights cases encompassed by the bill.

The Third Circuit's decision ignores the repeated statements throughout House Report 94-1558 and Senate Report 94-1011 that the purpose of the legislation was to promote enforcement of the civil rights laws by "private attorneys general," "to achieve uniformity in the remedies provided by Federal laws guaranteeing civil and constitutional rights" and to "remedy anomalous gaps" in the civil rights laws. Every other civil rights act which might apply to the United States and which permits the award of fees against any party waives sovereign immunity to permit fee awards against the United States.[4] No other attor-

3. ". . . it should further be noted that government officials are frequently the defendants in cases brought under the statutes covered by H.R. 15460 [the bill which was enacted]. See, *e.g.* . . . *Hills v. Gautreaux, supra*. . . . The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities." H.R. Rep. No. 94-1558, p.7 (1976).

4. 1964 Civil Rights Act, Title II, 42 U.S.C. §2000a-3(b); 1964 Civil Rights Act, Title III, 42 U.S.C. §2000b-1; 1964 Civil Rights Act, Title VII, 42 U.S.C. §2000e-5(k); Education School Aid Act of 1972, 20 U.S.C. §1617.

ney's fee provision in a civil rights act distinguishes between private and state defendants on the one hand and federal defendants on the other. Instead of creating "uniformity" and "consistency" the Third Circuit's decision merely creates a different anomaly, between the civil rights acts covered by the Fees Awards Act and all other civil rights acts with attorney's fee provisions. Furthermore, it fails to apply the rule of construction which this Court utilized in *Alyeska, supra,* 421 U.S. at 267:

> "If, as respondents argue, one of the main functions of a private attorney general is to call public officials to account and to insist that they enforce the law, it would follow in such cases that attorney's fees should be awarded against the Government of the officials themselves."

The Third Circuit's ruling thus vitiates the only articulated purposes of the Congressional action.[5]

Although the legislative debates were complex, the Court of Appeals erred when it stated at footnote 2 that "Congressman Drinan, a House sponsor of the bill, noted that the Allen Amendment [inserting the clause concerning tax enforcement proceedings] was the only provision in the bill which would involve expenditures by the United States." A careful reading of the passage referred to indicates the Congressman was commenting on the *effects* of the Allen Amendment and was stating that the costs to the government under it would

5. The frequently made statements in the legislative reports and debates that a purpose was to reverse *Alyeska Pipeline Service Company v. Wilderness Society, et al.*, 421 U.S. 240 (1975), is not contrary, for *Alyeska* clearly stated, although in dictum, that fees could not be awarded against the United States as well as against private parties. 421 U.S. at 267-268. There is no statement by any member of Congress that they intended to preserve part of *Alyeska* and the decision in *Hutto v. Finney, supra*, establishes that the 1976 Act did more than merely reverse the "American Rule" for private parties.

be "negligible" because it would award fees "only in special circumstances," i.e. if the United States brought a tax suit to harass a taxpayer or if such suit was frivolous and vexatious. 122 Cong. Rec. H 12159 (daily ed., Oct. 1, 1976).

Much more to the point, and also ignored by the Court of Appeals, was the statement made three times by Congressman Railsback, ranking minority member of the Subcommittee which reported the bill, in response to questions by Rep. Quie, that the United States would be potentially liable for fees not only to prevailing defendants in tax cases under the Allen Amendment, but to defendants prevailing in *civil rights cases.*

> "MR QUIE. First I would like to ask if the U.S. Government is the plaintiff in a civil rights case against an individual or corporation, can that individual or corporation as the prevailing party be awarded attorney's fees against the U.S. Government?
>
> * * * *
>
> MR. RAILSBACK. Mr. Speaker, as I read the bill before us, my answer would be yes. What we do is limit the United States from recovering but we do not limit the rights of other prevailing parties to recover in the event the United States would be the plaintiff in an action such as described in the bill.
>
> MR. QUIE. Mr. Speaker, if the gentleman will yield, would the gentleman from Massachusetts agree with that answer? Does the gentleman agree with that answer?
>
> MR. DRINAN. I am not entirely certain because the statutes covered by this bill are not

ordinarily used by the United States to initiate civil rights cases.

* * * *

MR. RAILSBACK. What my answer is, as I read the bill before us, we limit the right of the U.S. Government to recover, we do not limit it in a case where the United States would be the plaintiff suing a defendant, we do not limit the defendant's right to recover. Where the judge might decide that a prevailing defendant should recover, we do not limit the defendant from recovering from the United States in civil rights cases.

* * * *

MR. QUIE. Mr. Speaker, if the gentleman will yield further, the next question I have on the IRS is if the United States is the plaintiff and loses a civil rights case against a school district or college, can that school district or college as the prevailing party be awarded attorneys fees against the U.S. Government?

MR. RAILSBACK. Mr. Speaker, if the gentleman will yield further, again it would be in the discretion of the court and nowhere in the bill do we prevent a school district or college from recovering reasonable attorneys fees, even in a case where the United States is a party plaintiff."

122 Cong. Rec. H 12163-4 (daily ed., Oct. 1, 1976).

Finally, it is important to note that when the spokesman for the Department of Justice, Assistant Attorney General of the Civil Division, Rex E. Lee, testified "in principle" in support of the bill as then drafted before the House Judiciary Subcommittee, he interpreted it as applying to the federal government.

"H.R. 8220 would authorize the awarding of attorney's fees to a prevailing plaintiff in actions brought under certain civil rights statutes. Actions under the statutes involved have been brought against both Federal officers and private individuals."[6]

H.R. 8220 was identical to H.R. 9552 except award of fees was mandatory under the former and discretionary under the latter. The Department of Justice favored discretionary fees, supporting H.R. 9552. According to footnote 4 of the House Report:

"Apart from the addition of Title IX of Public Law 92-318, the only difference between H.R. 9552 and the clean bill (H.R. 15460) [the bill as enacted, except for the addition of the tax enforcement clause by the Allen Amendment] are technical, not affecting the substance, made on advice of the House Parliamentarian and staff and legislative counsel."

This contemporaneous interpretation of the Act as applying to federal officials is consistent with the actions of the two divisions of the Department of Justice through their respective Assistant Attorneys General consenting to substantial awards being entered against the United States by district court judges for attorney's fees pursuant to the Fees Awards Act. Orders issued in *Adams v. Califano,* Civil Action No. 3095-70 (D.D.C., May 3 and 5, 1978) and *Women's Equity Action League v. Califano,* Civil Action No. 74-1720 (D.D.C., May 3, 1978) awarded plaintiffs approximately $310,000 in attorney's fees pursuant to a December 29, 1977 decree signed by Judge Pratt and consented to by the Civil Division of the Department of

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6. "Awarding of Attorneys' Fees," *Hearings before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice*, 94th Cong., 1st Sess. at 176.

Justice through its Assistant Attorney General which settled litigation brought under Title VI and Title IX (both covered by Section 1988) against the Secretaries of HEW and Labor. Part V of that order provided that the

> "[p]laintiffs and intervenors are also entitled under . . . 42 U.S.C. 1988 to the award of reasonable attorneys' fees."

On October 25, 1977, a separate order relating to settlement of another aspect of the *Adams* case resulted in an award of $107,914.95, again consented to by the Justice Department and approved by Judge Pratt pursuant to Section 1988.

In a wholly separate matter, *NAACP v. Bell*, Civil Action No. 75-1317 (D.D.C.), the Civil Rights Division conceded in an October 14, 1977 brief signed by its Assistant Attorney General that Section 1988 applied to the federal government by failing to counter the NAACP's lengthy arguments to that effect. Judge Parker therefore concluded in an April 3, 1978 decision that the "[d]efendants do not contest the validity of applying this act . . . to obtain an award from the government," slip op. at 2, and awarded $26,300.00 against the Department of Justice. (Appeal filed June 2, 1978, No. 78-1639.)

These interpretations by the Assistant Attorneys General charged with advising the Congress of the Department's views on the impact of proposed legislation and with the actual implementation of the Act are entitled to significant weight in assessing legislative intent.

Finally, the decision below to narrowly construe the Fees Awards Act in order to protect sovereign immunity in an ancillary matter such as fees and costs is utterly inconsistent with the nearly simultaneous enactment of P.L. 94-574, 90 Stat. 2721 amending the Administrative Procedure Act, which was approved by

the House the same day as the Fees Awards Act and which was signed into law two days later. Section 1 of that act, 5 U.S.C. §702 (1976) eliminates the defense of sovereign immunity as to any action in federal court seeking relief other than money damages and stating a claim, like the claim in this case, based on the assertion of unlawful official action.[7] The House Report on the Fees Awards Act emphasized that fees awarded under Section 1988 are not damages and stressed that counsel fees are "particularly important" in cases where damages are barred by immunity doctrines. H.R. Rep. No. 94-1558 at 8-9. In *Hutto v. Finney*, *supra*, at 2576, n.24 this Court reaffirmed the long-standing principle that attorney's fees are very different from damages:

> "Unlike ordinary 'retroactive' relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief."

It has long been observed that related statutes must be read in conjunction with each other. *See, e.g. Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

In light of that sweeping policy waiving sovereign immunity there exists no support for a policy requiring extraordinarily express language above and beyond that normally needed to establish legislative intent in order to comply with the requirement of 28 U.S.C. §2412. The House Report's position in connection with the adequacy of the language of Section 305(f) of the Clean Air Act Amendments of 1977, *supra*, is consistent with such a revised policy. Similarly, the 1976 Fees Awards Act is a statutory provision

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7. "An action in a court of the United States seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . ."

authorizing fees in "all" proceedings covered thereby, and the doctrine of sovereign immunity, which has been waived except in damage cases, should not create any bar to effectuating the Congressional purpose of promoting private attorneys general and creating uniform remedies in our civil rights laws.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

ROBERT W. SAYRE
3800 Centre Square West
Philadelphia, Pennsylvnaia 19102

MICHAEL CHURCHILL
THOMAS K. GILHOOL
Public Interest Law Center of Philadelphia
1315 Walnut Street, Suite 1600
Philadelphia, Pennsylvania 19107
Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2255

MAURICE SHANNON, CAROLYN BECK, BASIL H. LOSTEN, IRENE SISK, THOMASENE MACK, MILDRED BATES, LUCILLE WEEKS, TYRONE BEAL, BRENDA PARKER, FRANCES McCARTHY, CATHERINE M. P. TAYLOR, JAMES W. WILLIAMS, JUANITA WILLIAMS, CHARLES JOHNSON, SAMUEL D. BROG, LIBERYPLACE CIVIC ASSOCIATION, FRIENDS NEIGHBORHOOD GUILD, FRIENDS HOUSING COOPERATIVE, THE GERMAN SOCIETY OF PENNSYLVANIA, for themselves and all others similarly situated,

Appellants,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; GEORGE ROMNEY, Secretary of Department of Housing and Urban Development; WARREN P. PHELAN, Regional Administrator, Region II, Department of Housing and Urban Development; and THOMAS J. GALLAGHER, Regional Administrator; Federal Housing Administration, Department of Housing and Urban Development,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D.C. No. 69-197

Before HUNTER, WEIS, *Circuit Judges*, and LAYTON, *District Judge*.*

OPINION

(Filed June 5, 1978)

PER CURIAM

This appeal raises the question whether the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-599, 90 Stat. 2641, permits an award of fees against the United States in a suit under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* Since we agree with the district court that the Attorney's Fees Act does not operate as a waiver of sovereign immunity in this context, we affirm.

Plaintiffs filed suit in 1969 challenging approval by the Department of Housing and Urban Development of a rent supplement program known as Fairmount Manor in the East Poplar neighborhood of Philadelphia. The district court originally dismissed the complaint, 305 F.Supp. 205 (E.D. Pa. 1969), but was reversed by this court, 436 F.2d 809 (3d Cir. 1970). We held that the Department had violated certain civil rights laws including Title VI, and remanded for further proceedings. During the pendency of the

* Honorable Caleb Rodney Layton, 3rd, United States District Judge for the District of Delaware, sitting by designation.

remand, the parties agreed upon a settlement, and the district court entered judgment for plaintiffs in May, 1975. Plaintiffs then moved for an award of attorneys fees, which the district court denied. 409 F. Supp. 1189 (E.D. Pa. 1976).

Plaintiffs renewed their request for counsel fees, based on the newly enacted Civil Rights Attorney's Fees Awards Act, in their appeal of the Clerk's taxation of costs. The district court agreed to reopen the matter, but held that the award of fees, despite the new Act, was still barred by the doctrine of sovereign immunity. The court reasoned that 28 U.S.C. § 2412[1] was an express assertion of sovereign immunity prohibiting the award of counsel fees against the United States absent statutory authority. Noting that a waiver of sovereign immunity must be strictly construed, the court ruled that the new Act did not authorize an award of attorneys fees against the United States in a suit under Title VI. The court contrasted the explicit waivers of immunity found in Titles II, III, and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2200a-3(b), 2000b-1, 2000e-5(k).

We agree with the analysis of the district court. Under 28 U.S.C. § 2412, attorneys fees may not be awarded against the United States absent clear statutory authority. *United States v. Testan*, 424 U.S. 392, 399 (1976); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 265-68 (1975); *Fitzgerald v. United States Civil Service Commission*, 554 F.2d 1186, 1189 (D.C. Cir. 1977); *cf. Richerson v. Jones*, 551 F.2d 918, 925 (3d Cir. 1977) (denying award of interest on claim against United States). The Civil Rights Attorney's Fees Awards Act amends 42 U.S.C. § 1988 to provide:

1. 28 U.S.C. §2412(a) provides:

The United States shall be liable for fees and costs only when such liability is expressed provided for by Act of Congress.

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986], title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

With the exception of certain suits under the Internal Revenue code, *see Aparacor, Inc. v. United States*, No. 139-73 (Ct. Cl. Feb. 22, 1978), the Act does not explicitly waive the sovereign immunity of the United States. It contains none of the language usually used to indicate a waiver of immunity. *See, e.g.*, 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act) ("The court may assess against the United States reasonable attorney fees . . . ."); 42 U.S.C. § 2000a-3(b) (Title II of the Civil Rights Act of 1964 (". . . the United States shall be liable for costs the same as a private person."); 15 U.S.C. §§ 2059 (e)(4), 2060(c) (Consumer Product Safety Act); 42 U.S.C. § 2000b-1 (Title III of Civil Rights Act of 1964); *id.* § 2000e-5(k) (Title VII of Civil Rights Act of 1964). Further, our reading of the legislative history of the Act convinces us that Congress did not contemplate a waiver of sovereign immunity in passing the Act, with the exception of the clause dealing with Internal Revenue suits.[2] *See*

2. The Allen Amendment, dealing with tax suits, was added late in the consideration of the bill from the floor of the Senate. *See* 122 Cong. Rec. S17049-51 (daily ed. Sept. 29, 1976). Congressman Drinan, a House sponsor of the bill, noted that the Allen Amendment was the only provision in the bill which would involve expenditures by the United States. 122 Cong. Rec. H12159-60 (daily ed. Oct. 1, 1976).

Southeast Legal Defense Group v. Adams, 436 F. Supp. 891, 893 (D. Ore. 1977). Accordingly, we hold that the Attorney's Fees Act does not permit an award of counsel fees against the United States in a suit brought under Title VI.

The order of the district court denying counsel fees will be affirmed.

The legislative history also clarifies an ambiguity in the statute caused by the Allen Amendment. The phrase "by or on behalf of the United States of America" was meant to modify only the phrase "to enforce, or charging a violation of, a provision of the United States Internal Revenue Code," and not the phrase "or Title VI of the Civil Rights Act of 1964." *See* 122 Cong. Rec. S17049-53 (daily ed., Sept. 29, 1976); *id.* H12151-52, 12161 (daily ed. Oct. 1, 1976).

APPENDIX B

UNITED STATES DISTRICT COURT,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 69-197.

MAURICE SHANNON, *et al.*
v.
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*

June 16, 1977.

OPINION

JOSEPH S. LORD, III, *Chief Judge.*

This is an appeal by plaintiffs from the Clerk's taxation of costs. We have previously considered and denied plaintiffs' motion for counsel fees under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 et seq. (1970), as amended, (Supp. IV, 1974). *See Shannon v. U. S. Department of Housing & Urban Development*, 409 F.Supp. 1189 (E.D.Pa.1976). Plaintiffs now ask that we award counsel fees pursuant to "The Civil Rights Attorney's Fees Awards Act of 1976", ("Fees Awards Act"), an amendment to 42 U.S.C. §1988, adopted on October 19, 1976. The amendment provides, *inter alia*, for the award of counsel fees as part of the costs in an action, as this suit is, to enforce Title VI of the Civil Rights Act of 1964.

[1] We must first consider whether the finality of our previous decision and plaintiffs' failure to appeal prevents us from considering the present petition. We think not. In our last opinion, we considered only the recoverability of attorneys' fees under Title VIII, which did allow them in certain actions under that Title. We held that this was not one of those actions. Here, on the other hand, we are faced with a question of whether attorneys' fees are recoverable as part of costs in an action to enforce Title VI. Since we still have before us plaintiffs' exceptions to the Clerk's ruling on other costs, and since the Fees Awards Act was promulgated after we originally considered attorneys' fees, we believe there is "reason justifying relief from the operation" of the order denying attorneys' fees. *See* F.R. Civ.P. 60(b)(6).

[2] Turning to the merits of plaintiffs' petition, we have concluded that the award of attorneys' fees is barred by the doctrine of sovereign immunity. Before 1966, the United States was liable for fees and costs only when such liability was expressly provided for by an act of Congress, 28 U.S.C. §2412. That section was amended in 1966, to permit the recovery of costs unless specifically forbidden by statute. However, Congress explicitly excluded "the fees and expenses of attorneys" from the costs recoverable under §2412. Thus, Section 2412 stands as an explicit assertion of sovereign immunity as respects the fees and expenses of attorneys. *See Alyeska Pipeline Service Company v. Wilderness Society et al.*, 421 U.S. 240, 268 n. 42, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 168 U.S.App.D.C. 111, 512 F.2d 1351 (1975).

In *Alyeska*, speaking of the allowance of attorneys' fees against the government, the Court said, 421 U.S. at pages 267-268, 95 S.Ct. at page 1626:

> ". . . But §2412 on its face, and in light of its legislative history, generally bars such awards, which, if allowable at all, must be expressly provided for by statute, as, for example, under Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a—3(b)."

Title II to which the Court referred provides:

> "(b) In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and *the United States shall be liable for costs the same as a private person.*" 42 U.S.C. §2000a—3. (Emphasis added).

There are other instances of Congress' awareness of the necessity of clear language to waive sovereign immunity. Title 42 U.S.C. §2000b—1 provides:

> "In any action or proceeding under this subchapter the United States shall be liable for costs, including a reasonable attorney's fee, the same as a private person."

Title 42 U.S.C. §2000e—5(k) states:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and *the United States shall be liable for costs the same as a private person.*" (Emphasis added).

The unequivocal language to which the Court adverted in *Alyeska* and that contained in the statutes quoted above is in stark contrast to the silence of the Fees Awards Act. It may be that the lack of specificity was a Congressional oversight or it may have been deliberate. If the former, the correction must be made by Congress. It cannot be made by the court. If the latter, we are bound by it.

Plaintiffs' claim the following expenses:

Venturi & Rauch-report and testimony	$3,051.00
Postage, phone, attorneys' travel & miscellaneous	277.23
Copies of documents	790.00
Copies of briefs & appendix	710.00
Allowed by Clerk	35.75
Total	$4,863.98

[3, 4] The only expenses which may be allowed are those for which sovereign immunity has been waived. Any waiver of sovereign immunity must be construed strictly within its terms. The softening 1966 amendment to 28 U.S.C. §2412 limits the costs and expenses made recoverable from the United States to those allowed by 28 U.S.C. §1920. That Section provides:

> "A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

[5] The Clerk found that the $790.00 claimed for copies of documents were for copies given to plaintiffs and therefore are not recoverable under §1920(4). However, we believe the $710.00 claimed for briefs and appendix submitted to the Court of Appeals is allowable either under §1920(3) or (4). The remaining claims are clearly without §1920.

[6] We recognize that in exceptional private party cases, the courts may exercise their equitable powers to allow costs not covered by § 1920. However, the cases in which this power was invoked did not involve the bar of sovereign immunity. And in §2412, the waiver of sovereign immunity was firmly bounded by the limitations of §1920. Furthermore, to make it even more explicit, the "fees and *expenses of attorneys*" were specifically excluded.

Nor is the Fees Awards Act of any avail to plaintiffs. Its only reference to costs is the allowance of attorneys' fees as costs against a losing private party. Plaintiffs' recovery of costs and expenses, therefore, remain confined by the boundaries of §1920.

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action

No. 69-197

MAURICE SHANNON, *et al.*
v.
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*

ORDER

AND NOW, this 16th day of June, 1977, it is ORDERED as follows:

1. Plaintiffs' request for counsel fees is DENIED.
2. The plaintiffs' exception to the Clerk's denial of the amount of $710.00 for costs of printing is SUSTAINED; in all other respects the plaintiffs' exceptions are overruled.

By the Court

JOSEPH S. LORD, III, *Chief Judge*